IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05-11-2007

CORAM:

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

C.R.P.(PD)No.2647 of 2007
&
M.P.No.1 of 2007

1.D.Saroja
2.D.Ravikumar
3.D.Kumar @ Sivakumar
4.D.Prabakaran
5.D.Ramesh
6.D.Murali . . Petitioners/Plaintiffs

Vs.

1.Saraswathi
2.K.Mohanarangan
3.K.Kothandapani
4.S.Thanikachalam
5.Santhi
6.Jeyanthi
7.Karthikeyan
8.Sankari
9.Santha Lakshmi
10.P.Subash Chand Jain . . Respondents/Defendants

The civil revision petition is filed to set aside the order dated 04.07.2007 passed in I.A.No.40 of 2007 in O.S.No.5399 of 2003 passed by the Additional District Judge, V Fast Track Court, Chennai.

For Petitioners : Mr.S.Ponnarasi
For Respondents : Mr.N.Jayabalan for R10

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ORDER

The plaintiffs in the suit have filed the present revision petition under Article 227 of the Constitution of India against the order of the learned trial Judge in rejecting the application filed by the plaintiffs in I.A.No.40 of 2007 under Section 10 CPC to stay all the further proceedings in O.S.No.5399 of 2003 until the disposal of the Application Nos.150 and 151 of 2006 in T.O.S.No.44 of 1994 pending before this Court.

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2. Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the tenth respondent, who is the purchaser from respondents 1 to 9. It is seen that in I.A.No.40 of 2007 respondents 1 to 9 have remained exparte and the trial Court has rejected the said application. It is the case of the plaintiffs that the the respondents 1 to 9 are the their relatives who sold the suit property based on the order of Probate passed by this Court on 19.11.1999 with regard to the alleged Will dated 30.04.1971 said to have been executed by the petitioner's grandfather namely M.Subramania Pillai. It is the further case of the petitioners that the said probate has been got by forging the signature of the first petitioner as if she had signed in consent affidavit in the probate proceedings to which she is not a party. The probate was converted in to a Testamentary Original Suit on objections by one of the sisters namely S.Vasantha who has raised objections about the signature in the consent affidavit which was obtained by way of force.

3. It is seen that after converting as Testamentary Original Suit, this Court has passed a judgment dated 09.11.1999 wherein this Court has elaborately dealt with the Will as well as the case of the said Vasantha that her signature was not obtained by force and come to a conclusion that the execution of the Will has been properly proved and in view of the same, TOS was allowed.

4. The case of the first plaintiff is that she came to know about the forgery of the signature in the consent affidavit only now and hence she files the application Nos.150 & 151 of 2007 in T.O.S.No.44 of 1994 for setting aside the judgment passed therein and the plaintiffs have filed the O.S.No.5399 of 2003 for a declaration and permanent injunction in respect of the suit property.

5. The question to be decided is as to whether the pendency of the application in I.A.Nos.150 and 151 of 2007 in this Court to set aside the judgment in T.O.S.No.44 of 1994 will be a ground to stay the suit which is pending in O.S.No.5399 of 2003 before the Court below. The learned trial Judge has dismissed the application on the basis that Section 10 CPC which contemplates that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of the claim litigating under the same title, where such suit is pending in the same or in any other Court in India having jurisdiction to grant relief claimed. Admittedly, the applications filed by the revision petitioners before this Court is of the year 2007, merely because the tenth respondent has purchased properties

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from the respondents 1 to 9 who have taken part in the TOS, is not a ground for the purpose of the staying the proceedings. As rightly pointed out by the learned trial Judge Section 10 CPC has no application since the suit filed is not a later suit. Further it is seen that the suit is allowed not only on the basis that the first petitioner's signature has not been forged in the consent affidavit in the original proceedings but also on the basis that the plaintiffs have perfected the title by adverse possession.

6. As rightly pointed out by the learned counsel appearing for the tenth respondent, the Honourable Supreme Court has held in INDIAN BANK v. M.S.CO-OP MARKETING FEDN. LTD., (AIR 1998 SCC 1952) that the word 'trial' in Section 10 in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit the 'trial' really begins after the Court or the Judge grants leave to the defendant to contest the suit. Therefore, the Court or the Judge dealing with the summary suit can proceed up to the state of hearing the summons for judgment and passing the judgment in favour of the plaintiff (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted. The Honourable Supreme Court has further held that the course of action which the Court has to follow according to Section 10 CPC is not to proceed with the 'trial' of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. In view of the object and nature of the provision and the fairly settled legal position with respect to passing of interlocutory orders it has to be stated that the word 'trial in Section 10 CPC is not used in its widest sense. By applying the said dictum laid down by the Honourable Supreme Court, the court below has rightly dismissed the application, I do not see any irregularity or illegality in the order of rejecting the application filed by the plaintiffs under Section 10 CPC. Hence the revision fails and the same is dismissed. However, the learned counsel appearing for the petitioners has brought to the notice that the learned trial Judge while dismissing the application has awarded costs. The learned counsel appearing for the tenth respondent would fairly submit that he is not insisting the same. In view of the same, the portion in respect of awarding the costs alone is set aside. It is made clear that the observation made in this revision shall not be taken in to consideration by the trial Judge while deciding the issue

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and the learned trial Judge is directed to dispose of the case independently on merits and in accordance with law. Consequently, connected miscellaneous petition is closed. No costs.

05.11.2007

jikr

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

TO

1.The Additional District Judge
(Fast Track Court),
Chennai.

1 cc to Mr.N.Jayabalan, Advocate, SR.66658
1 cc to Mrs.S.Ponnarasi, Advocate, SR.66184

nsm (co)
dv/23.1.

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